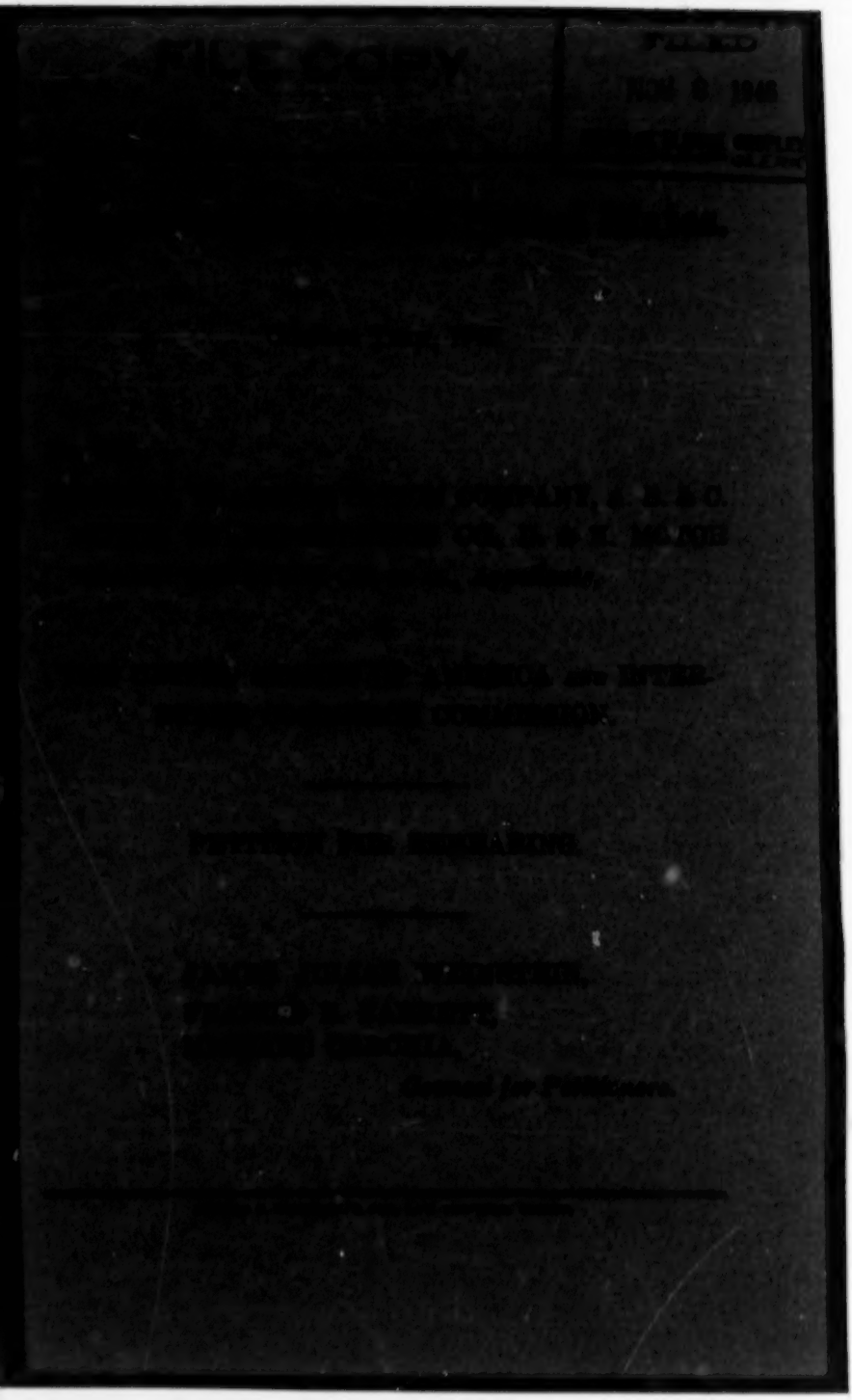

Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 276.

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. MOTOR TRANSPORTATION CO. ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

PETITION FOR REHEARING.

To the Honorable, the Justices of the Supreme Court of the United States:

Now come your petitioners, General Transportation Company, A. B. & C. Motor Transportation Co., D. & N. Motor Transportation Co. *et al.*, appellants in the above-entitled cause, who pray for rehearing of the case and assign as reasons therefor the following:

1. The subject-matter of this appeal is the propriety of a person selling his operating rights as a common carrier by motor vehicle sixteen months after he voluntarily abandoned his transportation business. The issue turns on the construction of Section 5 (2) (a) and (b) of Part I of the

Interstate Commerce Act. The single question presented for statutory interpretation is whether this transferor was a "carrier" within the meaning of Section 5 (2) (a) (i) of the Act.

2. The decision of the District Court, which affirmed the order of the Interstate Commerce Commission approving the sale, was based upon and controlled by its interpretation of Section 212 (a) of the Act, which deals with the procedure for revocation of certificates of public convenience and necessity. The decision stands upon an anomalous doctrine recently enunciated by the Commission, namely,

> "possession of a certificate, in and of itself, and without the performance of any transportation constitutes the holder thereof a 'motor carrier' subject to Part II. It follows, therefore, that the holder is a 'common carrier by motor vehicle,' and the proposed transaction is one within the scope of section 5 (2)(a) and may be approved if found to be consistent with the public interest, notwithstanding the abandonment of motor carrier operations."

3. The decision of the District Court overlooks the fact that Section 5 (2) of Part I of the Act is the only section pertaining to the transfer of operating rights of carriers. It disregards entirely the provision of Section 5 (2) (b), which was never mentioned, which provides that—

> ". . . If the Commission finds that . . . the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . ."

Subparagraph (a) of Section 5 (2) provides for—

> ". . . any carrier . . . to purchase, lease, or contract to operate the properties, or any part thereof, of another; . . ."

4. In establishing this new principle of the Commission the District Court based its decision on its interpretation of the Congressional intent as expressed in Section 212 (a) regarding the revocation of certificates. No finding that was based upon substantial evidence was ever made that the "proposed transaction is within the scope of subparagraph (a)." Instead, the District Court has completely reversed the common-law concept of a carrier, a common carrier, and even a certificate of public convenience and necessity. It does violence to the basic concept of the Act to Regulate Commerce. It ignores the clear delineations of the term "carrier" which the transportation industry has inherited from the many judicial interpretations of the Interstate Commerce Act. This case is the first of its kind in any court in this country and will vitally affect the transfer of operating rights of all carriers, especially motor, water and air carriers, in the future. To allow it to stand without the testing of full debate before the Supreme Court of the United States will surely give rise to abuse and injustice never intended by the Congress.

5. The Commission and the District Court were greatly concerned with the *jus disponendi* of the transferor so long as he was the holder of an outstanding unrevoked certificate of public convenience and necessity; that the denial of the right to transfer would effect a "partial revocation" of such certificate without complying with the provisions of Section 212 (a) of Part II of the Act.

6. There is nothing within the plain language of Section 5 (2) of Part I of the Act which is inconsistent with other sections of the Act, even Section 212 (a) of Part II. The denial of the right to transfer a certificate, when the holder has gone out of business, sold his equipment, closed his terminal and discharged his employees, still leaves the holder of an outstanding unrevoked certificate of public convenience and necessity exactly where he was before he attempted to sell it. The denial of approval does not revoke it or "partially" revoke it. He still has the right, if he so chooses, to start up again his transportation business. That was all that Section 212 (a) of Part II was ever intended to give him. All decisions of the Commission on similar facts, prior to the enunciation of this so-called Blackhawk doctrine, denied such an applicant its approval of the transfer of his certificate of public convenience and necessity on the ground that possession of operating authority alone was not sufficient to constitute a person a motor carrier within the meaning of Section 5; that it was always incumbent upon applicants under Section 5 to establish the jurisdictional facts, including carrier status of the person whose properties were sought to be purchased or otherwise acquired. It is well established that the Commission must make those basic and essential findings necessary to give its order of approval of a sale the requisite statutory validity. Therefore it must make a finding that the vendor of a certificate is a *carrier* within the meaning of Section 5 of Part I of the Act which can be supported by substantial evidence.

7. The term "carrier" as used in the Interstate Commerce Act has a long history of judicial interpretation. *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175. *Chicago, New York & Boston Refrigerator Co.* v. *Interstate Commerce*

Commission, 265 U.S. 292. *United States* v. *American Railway Express Co.*, 265 U.S. 425. *Taylor* v. *N.Y. Central R.R.*, 62 N.E. (2) 777 (C.C.A. 2d 1945). Every provision of the Act applies to a "going-concern" carrier. The natural meaning of the word "carrier" is one who operates as a carrier by railroad or any other conveyance. The first thing that is looked at in determining the status of a carrier is the physical aspect of the company. It is fundamental that "carrier" status requires not only a holding out with ability and willingness to transport but also some actual transportation consistent therewith. Yet without judicious reasoning or legal precedents the Commission transcended these well-settled propositions and decided the case wholly upon a new theory of importance of the term "certificate of public convenience and necessity."

8. The grant of a certificate of public convenience and necessity has always been only the grant of a privilege to serve the public. It is transferable only by gift of the statute. Being a public grant, the *quid pro quo* is service to the public. It is *not* property in any legal or constitutional sense. It is an obligatory franchise; he must hold himself out to serve the public; he must keep his machinery in repair. Yet the decision of the District Court holds that, since the holder of a certificate cannot be deprived of the ownership of his property without a hearing according to Section 212 (a) of Part II of the Act, then it must follow that he cannot be prevented from selling his certificate, even though he has long since abandoned the basis for its existence. But there is no guaranty of a *jus disponendi* in the Interstate Commerce Act. Any disposition must have the approval of the Commission. Such approval is confined for statutory authority only to Sections 5 (2) (a) (i) and 5 (2) (b). The word "certificate" does not appear any-

where in this part of the Act and the only issue in applications under Section 5 is the transfer of "properties" of a "carrier" in the public interest. It is respectfully submitted that this phase of the case was overlooked by the District Court.

9. The public policy is against the principle now established by the instant case. It encourages the trafficking in certificates without benefit to the public. It enables an existing common carrier to extend its operations, as was done here, by the simple device of purchasing an outstanding unrevoked certificate without proving that the public convenience and necessity require the extended service. It is a serious threat to the economic condition and stability of the other common carriers in the field. It fosters a circumvention of the statutory standards of public convenience and necessity never contemplated by the Act. The "grandfather" clause of the Motor Carrier Act of 1935 was incorporated to prevent a mad scramble for operating rights and to issue certificates only on proof of actual bona-fide operations on June 1, 1935. All other certificates could be issued only on proof that the public convenience and necessity required the proposed new operations. Legal precedents and statutory language have continuously emphasized the going-concern status of carriers transferring their operating rights. Nowhere has judicial interpretation sanctioned such a transferable asset theory of a certificate of public convenience and necessity as implied in the decision of the District Court. The effect of this doctrine will place the value of a certificate not in keeping with its natural worth as representative of a transportation business but on the arbitrary worth to a competitor seeking to use the empty certificate for his personal aggrandizement. Such a principle has no place in a transportation system

notoriously beset with economic ills. It was born of erroneous respect for the importance of Section 212 (a) of Part II of the Act, which has little, if anything, to do with the provisions of Section 5 (2) (a) and (b) of Part I of the Act.

Wherefore your petitioners respectfully pray for rehearing of this cause in order that a full review of the case be had other than the single review of the District Court.

GENERAL TRANSPORTATION COMPANY,
A. B. & C. MOTOR TRANSPORTATION CO.,
D. & N. MOTOR TRANSPORTATION CO.,
LOWELL TRUCKING CORPORATION,
By JAMES JULIAN WEINSTEIN,
FRANCIS E. BARRETT,
MICHAEL CARCHIA,
Counsel for Petitioners.

Certificate of Counsel.

I, Michael Carchia, counsel for petitioners in the above-entitled cause, do hereby certify that this petition for rehearing by the Supreme Court of the United States is presented in good faith and not for delay.

MICHAEL CARCHIA,
Counsel for Petitioners.